10-26-2011

Indian Springs L.L.C. v. Andersen Appellant's Reply Brief Dckt. 38369

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Supreme Court No. 38369-2010

INDIAN SPRINGS LLC, an Idaho Limited Liability Company
Plaintiffs and Respondents,
VS.
TERRY ANDERSEN and ROSANNA ANDERSEN, Husband and Wife; EVERETT and MARGIE ELLS, Husband and Wife; and any and all individuals claiming any possessory interest by or through him.
Defendants and Appellants

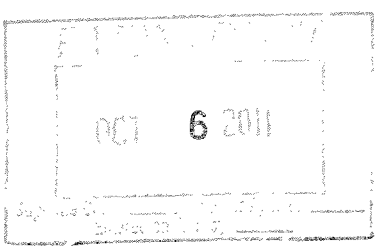
TERRY and ROSANNA ANDERSEN, Husband and Wife;
EVERETT and MARGIE ELLS, Husband and Wife;
Counterclaimants / Appellants,
VS.
INDIAN SPRINGS, LLC, an Idaho Limited Liability Company, and THOMAS M. HENESH, an Individual
Counterdefendants / Respondents

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District for Power County.
Hon. Stephen S. Dunn, District Judge presiding,

Terry Andersen
Rosanna Andersen
775 Yellowstone, PMB 121,
Pocatello, ID 83201
Appellant

Lane V. Erickson (ISB#: 5979)
201 E. Center St., POB 1391
Pocatello, ID 83204 - 1391
Attorney for Respondent



Terry and Rosanna Andersen
775 Yellowstone, #121
Pocatello, ID 83201
(208) 233-1020
Pro Se

IN THE IDAHO STATE SUPREME COURT

INDIAN SPRINGS, LLC, an Idaho limited liability company Plaintiffs-Counterdefendants-Respondents and THOMAS M. HENESH, an individual, Counterdefendant-Respondent, vs. TERRY & ROSANNA ANDERSEN, husband and wife; and any and all individuals claiming any possessory interest by or through him, Plaintiffs-Counterclaimants-Appellants, and EVERETT and MARGIE ELLS, husband and wife, Plaintiffs-Counterclaimants	**SUPREME COURT NO.** **38369-2010** **APPELLANTS' REPLY BRIEF**

TABLE OF CASES AND AUTHORITIES

STATEMENT OF CASE

Plaintiffs-Counterclaimants-Appellants, Terry Andersen and Rosanna Andersen, ("Andersens" - OR "Appellants") having filed the Appellants' Brief, and having received copies of the Respondent's Brief hereby file this timely Reply Brief in Support of Appeal. Contrary to the Respondent's Brief (p.5, 2nd paragraph), this case began as a Complaint for Eviction under Idaho Code §6-310.[1] Andersens then filed a Motion to Dismiss[2] on the basis that with no landlord-tenant relationship, Idaho Code §6-310 did not apply. A hearing was held on the 10th of December, 2009, in which Judge Dunn of the lower gave refused to dismiss the case, and gave legal counsel from the bench to attorney Lane V. Erickson, representing the Plaintiffs-Counterdefendants-Respondents to change the plea from eviction to one of ejectment.[3] The December 10, 2011 transcript had been ordered and was supposed to be included with the Clerk's Record.[4] Since it was not, Appellants have filed a motion for enlargement of the record to include the Transcript.[5] With his research and counsel from the bench, the complaint was changed to one of ejectment, and Andersens' rights and interest in the mobile home were extinguished by Judge Dunn in the December 10th, 2009 hearing. Respndents' repeatedly bring case saying that Pro-se litigants should be held to the same high standards that attorneys are — Shouldn't attorneys be held to the same high standards as Pro-se Litigants?

During the proceedings, Appellants made a Motion for IRCP 54(b) Certificate, which would

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[1] Clerk's Record, p. 1

[2] Ibid. p. 94 & 96

[3] Transcript p.10, lines10-23, p.11, 12, & 13 (transcript was submitted on 11th day of Oct., 2011)

[4] Andersens submitted the original transcript along with 6 copies with a motion to Augument the Record to include the Transcript referred to in footnote 3 above.

[5] Transcript filed October 11th, 2011.

allow the Andersens to appeal on a partial judgment. Judge Dunn Denied the Motion. The judge narrowed the Appellants Counterclaim to address only 1) the broken locks on the well house and power box and 2) the Respondents' illegal use of electricity in an apparent attempt to stop an appeal. Therefore, Appellants dropped the specific claim on locks and power usage on in order to obtain a judgment to appeal.

An incident occurred during the proceedings wherein, under court order, Henesh (Respondent) was to allow Mahoney access to the storage shed to retrieve his personal property. Henesh had refused access, even though a Sheriff's Deputy and his attorney (Erickson) had told him that he needed to open it. When this was brought to the judge's attention,[6] he gave no reprimand to the Respondent for defying his orders.

BACKGROUND

In April of 1996, Andersens acquired title to the mobile home as part of the real estate purchase contract-agreement with D. Merritt Thornhill.[7] Title to the home was personally held by the Andersens and proof is found on the Title[8] property tax statement[9] of 2001. It is also noted on the various tax notices in the record[10] that the mobile home was taxed separate of the land. Even in the 1996 tax statement issued to M.K. and Josephine Thornhill[11] (parents of the seller / assignor to

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[6] Transcriipt, p. 25-26

[7] Clerk's Record, p. 213

[8] Ibid, p. 162

[9] Ibid, p. 64

[10] Ibid p. 62-64

[11] Ibid p. 65

Respondent), the mobile home was taxed separately from the land. It is registered and Title issued by the Department of Motor Vehicles. It could not be LEGALLY attached to the land without meeting the requirements that necessitated electrical and plumbing tests. **It was never legally attached to the Real Property, and never taxed as Realty.** In 2002, Ells became the title holders with the Andersens, when they made arranged and cosigned on a loan to the Andersens.[12] In 2000, AICO Recreational Properties entered into Reorganizational Bankruptcy to stop an unfounded foreclosure action and acquire clear Title. In 2004, the Bankruptcy Court, faced with a "burdensome" property (with serious title problems), issued an Order of Abandonment in which Ells were given possession of the mobile home.[13] Andersens names remained on the Title as co-owners.[14] Recently, the Ells, whose interest was satisfied, transferred all of their interests to the Andersens as noted by the Supreme Court in the Order dated August 12, 2011. Andersens occupied the home as their principal residence and secondary residence for about 13 years.[15] During that time, Andersens also made many repairs and improvements to the real property (approximately 192 acres[16]), including, but not limited to, water leaks in 2008 that were flooding the area near the Mahoney Residence which was on the Indian Springs property. Those 2008 repairs and improvements are only a very small item in the Counterclaim of this appeal.[17]

The Respondents have made claims to ownership of the property, based on a foreclosure

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[12] Ibid p. 56

[13] Clerk's Record, p. 83 (paragraph (c)

[14] Ibid p. 162

[15] Ibid. p. 104, line 5

[16] Ibid p. 12-14

[17] Ibid. p. 40 & 253-255

action and Sheriff's Sale. A discussion of the fallibilty of a Sheriff's Sale is found on page 16 of the Appellants' Brief. As part of the foreclosure action, Indian Springs LLC (the Respondents), utilized the Assignor's Notice of Default and Notice of Accelleration, dated the 24th of February, 2005.[18] This Notice violated the automatic stay of the Bankruptcy Court. In the present case, Appellants filed a Motion for Leave to Amend Pleadings, arguing that the Assignee (Henesh and/or Indian Springs LLC) inherited the liabilities of the Assignor, quoting cases from six states, including Idaho.[19] Respondents responded with an Objection[20], errantly claiming there was no Idaho authority utilized to substantiate the Appellants' Motion to Amend. Judge Dunn granted the Respondents' Motion to Dismiss.[21] Whereupon, Appellants filed a Notice of Appeal.[22] It is of importance to this appeal that the Court review the issue of Liability.

Can the Plaintiff (Respondent) rely on a Notice of Default issued by the Assignor, sometime before his acquisition of the Note and Mortgage, and separate himself from the liabilities?

AND: can the Assignee dismiss those liabilities, and take full advantage of the improvements and repairs done on the property without a charge of Unjust Enrichment?

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[18] Ibid. P. 71-74

[19] Ibid. p. 269-272

[20] Ibid. p. 273-275

[21] Ibid. p. 293

[22] Clerk's Record, p. 359-363

FACTS CONCERNING ISSUES RAISED IN RESPONDENTS' BRIEF

Rule 15(b) was NOT part of the Respondents' Complaint for Eviction.[23] Rule 15(b) was only introduced after Judge Dunn gave legal advice from the bench to the Respondents' Attorney Erickson.[24] Andersens objected to the judge's abuse of discretion.[25] It was as though the Judge had an agenda partial to the Plaintiff (Respondent). Plaintiffs' Attorney, Erickson, stated that the issue of 15(b) **"had not been raised, to apply the evidence to the theory of ejectment."**[26]

It is still questionable whether the Mobile Home is part of the Real Property. It is true that the Appellants presented testimony that the home was set on a cinder block foundation, and the garage was attached. However, in previous research, it was discovered that NONE of the previous improvements on the real property had been done with a building permit, the home and storage shed included. In the hearing on December 10, Andersens presented the problem with moving the home, in that Idaho Code for trailers manufactured before 1974 required that certain tests for electrical, water and sewage soundness needed to be met before the home could be moved (or attached to a parcel of land).[27] Judge Dunn could have ordered that Henesh reconnect the water and electrical to the home so that the required code tests could be conducted, and order the home moved. Instead, Judge Dunn declared that the home no longer belonged to the Andersens. It is believed to be an **abuse of discretion** giving NO CONSIDERATION to title, residency, and payment of taxes on the home as a separate entity for 13 years or more (p. 5 of this reply brief). The Respondent reversed his

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[23] Ibid p. 1-4

[24] Transcript of Dec. 10 hearing, p. 16

[25] Clerk's Record, p. 181 - last sentence of first paragraph

[26] Transcript, p. 16, lines 4-9

[27] Transcript, p. 17, lines 2-11

position as previously stated in the Amended Complaint for Eviction, wherein he stated "Pursuant to Idaho Code §6-310 et seq, Plaintiff is entitled to **immediate removal** of mobile home residences and possession of the real property."[28]

The Respondent has raised the issue as to whether the Judge properly dismissed the Andersens' counterclaim for unjust enrichment. The issue of unjust enrichment is referring to the numerable repairs and improvements that the Andersens made to the real property under "color of title", converted personal property, and a title to the mobile home.[29] That question is raised in the argument herein, and hinges on the issue of the assignor's liability passing to the assignee, and liability for repairs and improvements done under "color of title" as stated in Idaho Code §6-414.

[28] Clerk's Record, p. 3, line7

[29] Clerk's Record, p. 253-255

ARGUMENT

COLOR OF TITLE

In his Memorandum, Decision and Order (Supreme Court 34623, [appeal of the foreclosure action], p. 308 of the Clerk's Record), Judge Bush stated: *"Indian Springs concedes that the original transaction contemplated that D. M. Thornhill and his company, Indian Springs were to supposed to transfer property to A&B."* A & B, in this case, referred to a partnership, which has subsequently been dissolved, and all interests of the partnership passed from the partner to the Andersens. The foreclosure case also included the Counterclaim against the Respondent, Indian Springs LLC. While the original title of 1996 was supposed to go to the partnership, it did not, and Andersens operated the resort for seven years under the assumption that they had title. In the courts, Title to the property has always been a subject of controversy.[30] Andersens were unable to re-finance the property in 1999. Multiple banks refused to take a mortgage on the property due to TITLE PROBLEMS. These problems included, but not limited to: 1) differences between the Note and Mortgage, 2) ambiguity in the language of the documents, and 3)the absence of Mrs. Andersen's signature on the note. Here are some Supreme Court Opinions that demonstrate the problems that the banks foresaw:

In *Tipton v. Ellsworth,* 18 Idaho 207, 109 P. 134, The Idaho Supreme Court held that:

> "Where the provisions of a note, secured by mortgage, vary from the terms of the mortgage, **the provisions of the Note will prevail.**" In *Sirius LC v. Bryce H. Erickson, et al,* 144 Idaho 38, 156 P.3d 539, the Supreme Court held that "Under contract principles, a promissory note must be supported by consideration to be enforceable." *See Isaak v. Idaho First Nat'l Bank,* 119 Idaho 907, 909, 811 P.2d 832, 834 (1991).

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[30] Judge Bush failed to consider two motions in the foreclosure action, including one to correct the Title and the other regarding the amount being claimed. These motions could have resolved issues in the present case.

In *Bauchman-Kingston v. Haroldsen* Docket No. 34551, Idaho Supreme Court 2008 Opinion No. 120, the Idaho Supreme Court held that:

> Citing *Criston Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007), "A contract is ambiguous if it is reasonably subject to conflicting interpretations." "Determining whether a contract is ambiguous is a question of law over which this Court exercises free review." Where a contract is ambiguous and the parties' mutual intent cannot be understood from the language, intent is a question for the trier of fact. *Farnsworth v. Dairymen's Creamery Ass'n,* 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994).

In *U.S. v. McConkey* 430 F.2d 652, the judge denied foreclosure, and held that:

> "under Idaho law, incumbrance of community property is void unless both husband and wife join in execution and their signatures are acknowledged — the **mortgage was invalid** and not subject to foreclosure." (Reference to p. 237 of Clerk's Supplemental Record)

In *Hawe v. Hawe*, 89 Idaho 367, 406 P.2d 106 the Idaho Supreme Court held that:

> "A mortgage is an incident of debt and without a debt, obligation or liability there is nothing to secure and consequently there can be **no mortgage.**" In *Shaner v. Rathdrum State Bank,* 29 Idaho 576, 161 P.90, the Idaho Supreme Court concurred with *McNamara v. Culver,* 22 Kan. 661, and held that "a mortgage is an incident of debt and without a debt, obligation or liability there is nothing to secure and **consequently there can be no mortgage.**"

Repairs and Improvements were continued through 2009 on the assumption and trust that the Supreme Court in the appeal would resolve Title issues to make the property mortgageable. Improvements were completed by the Andersens under **COLOR OF TITLE.**

> IC § 6-404: When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under **color of title** adversely to the claim of the plaintiff, in good faith, **the value of such improvements must be allowed as a set-off against such damages.**
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> **Color of Title:** lending the appearance of **title,** when in reality there is no title at all; **Barrons Law Dictionary,** (4th Edition, p. 86)

A discussion and Case Law were presented in the Appellants' Brief on p. 18 and 19. The case law quoted was *Bach v. Miller and Harris, et al,* 144 Idaho 142, 158 p 3d 305, wherein the Court held the opinion as follows:

In *Bach v. Miller and Harris, et al,* 144 Idaho 142, 158 P.3d 305 — (ALSO Idaho Supreme Court Docket 31658, (2007) Opinion No. 57),

> "Idaho Code § 6-414 provides: Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the owner in possession of the same after the filing of an action as hereinafter provided, until the provisions of this act have been complied with; provided said occupant may elect, after filing of the action, to exercise his right to remove such improvements if it can be done without injury otherwise to such real estate. The Court held "Under IC § 6-414, an improver can recover if he can meet both prongs of a two-part test. *See Fouser v. Paige,* 101 Idaho 294, 297, 612 P.2d 137, 140 (1980) (citing *Smith v. Long,* 76 Idaho 265, 281 P.2d 483 (1955))." "First, the improvements must have been made under color of title, and second, they must have been made in good faith."

In *White v. Mock* 140 Idaho 882, 104 P.3d 3561the Idaho Supreme Court held that:

> "...the Real Property Purchaser was entitled to statutory damages under the Consumer Protection Act IC § 48-608(1) provides that "any person who purchases ..... goods ..... and thereby suffers any ascertainable loss .... as a result ..... of a method, act or practice declared unlawful by this act ..... may bring an action to recover actual damages or one thousand dollars ($1,000), whichever is greater." Having determined that the Defendants (Mocks) had engaged in an act or practice which was misleading, false, or deceptive to Plaintiff (White), in violation of the Idaho Consumer Protection Act, the jury was required to make an award of at least one thousand dollars to White."

The Assignor, Thornhill, stated on the property disclosure statement required by law that

there were "no known problems" with the electrical or sewage problems and that all improvements had been done with permits.[31] Contrary to the Assignor's statement — the Engineer's Site Study[32] exposes the multiple problems with environmental degradation and public safety issues with the septic tanks. These septic tanks, installed during Thornhill's occupancy and management, were made of disintegrating metal, and are not acceptable under standard code. What we can determine from these two testimonies is that the Assignor "had engaged in an act or practice which was misleading, false, or deceptive" to the Appelants — the same as in the case law quoted in *Bach v. Miller and Harris, et al,* and in *White v. Mock.* Idaho Code § 55-2502 clearly states: **In order to promote the public health, safety and welfare** and to protect consumers; it is the purpose of the provisions of this chapter **to require sellers of residential real property as defined in this chapter to disclose certain defects in the residential real property to a prospective buyer.**

In *Cummings v. Lowe,* 52 Idaho 1, 10 P.2d 1059 The Idaho Supreme Court held that:

> "An inspection of the property, by itself, does not preclude buyers from bringing an action for fraud. If any latent defects that are not discoverable upon a reasonable inspection exist, the buyer who has made an inspection and did not discover such defects can still recover if the seller fraudulently failed to disclose or misrepresented the existence of such defects." *Tusch Enter. V. Coffin,* 113 Idaho 37, 49-50, 740 P.2d 1022, 1034-35 (1987); *Bethlahmy v. Bechtel,* 91 Idaho 55, 59, 415 P.2d 698, 702 (1966).

In *Bauchman-Kingston v. Haroldsen* Docket No. 34551, (Idaho Supreme Court 2008 Opinion No. 120), The Idaho Supreme Court held that:

> "The statute of frauds renders an agreement for the sale of real property unenforceable unless the agreement or some note or memorandum thereof is in writing and signed by the party against whom enforcement is sought." *See* I. C. § 9-

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[31] Clerk's Record, p. 87-88

[32] Ibid, p. 88-89

505(4) "At minimum, land sale contracts must typically specify the parties involved, the subject matter thereof, the price or consideration, a description of the property and all other essential terms of the agreement." *P.O. Ventures,* 144 Idaho at 238, 159 P.3d at 875. "Agreements for the sale of real property that fail to comply with the statute of frauds are **unenforceable** for obtaining specific performance or damages." *Hoffman v. S V. Co.,* 102 idaho 187, 190, 628 P.2d 218, 221 (1981).

COUNTERCLAIM BASED ON ANDERSENS' IMPROVEMENTS TO THE REAL PROPERTY UNDER THE COLOR OF TITLE.

In the Answer to Verified Amendmended For Eviction and Counterclaim, there is a summarized list of the improvements made.[33] These improvements were made in good faith by the Appellants under the color of title. A detailed enumeration of the costs of these improvements were listed on page 91 of the Supplemental Clerk's Record in Supreme Court Docket # 34623. Some of the permits acquired by the Andersens for repairs to the septic and electrical problems are found in the Clerk's Record.[34] Total sum of improvements is $651,000. RESPONDENTS HAVE PREVIOUSLY ADMITTED THAT THE ORIGINAL TITLE WAS NOT CORRECT (Supreme Court 34623, [appeal of the foreclosure action], p. 308 of the Clerk's Record). Under IC §6-404, since the lower in the Foreclosure case ignored the Counterclaim to offset the foreclosure in the amount of $651,000, **Andersens are now justified in seeking awards for these expenses.** As in *Bach v. Miller and Harris, et al,* and in *White v. Mock,* they must be reimbursed for the value of these improvements. "The measure of damages in a claim of junjust enrichment is the value of the benefit bestowed upon the defendant which, in equity, would be unjust to retain without recompense

[33] Ibid, p. 33-39 & 253-254

[34] Ibid, p. 90-93

to the plaintiff. The measure of damages is not necessarily the value of the money, labor and materials provided by the plaintiff to the defendant, but the amount of benefit the defendant received which would be unjust for the defendant to retain." *Gillette v. Storm Circle Ranch,* 101 Idaho 663, 666, 619 P.2d 1116, 1119 (1980). "The prima facie case for unjust enrichment is "(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof." *Aberdeen-Springfield Canal Co. V. Peiper,* 133 Idaho 82, 88, 982 P.2d 917, 923 (1999) (quoting *Curtis v. Becker,* 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct. App. 1997). Inequity exists if a transaction is inherently unfair, *King v. Lang,* 136 Idaho 905, 910, 42 P.3d 698, 703 (2002). The claim for unjust enrichment meets these requirements as outlined in the Clerk's Record, page 261.

COUNTERCLAIM INCLUDES VARIOUS PERSONAL PROPERTY PURCHASED BY ANDERSENS BEFORE AND SUBSEQUENT TO THE ORIGINAL PURCHASE

The Counterclaim is also based in part on certain personal property previoously owned or subsequently purchased by the Andersens[35] which was located on the real property. The list of that property appears in the Answer to Verified Amended Complaint for Eviction and Counterclaim.[36] The property is valued at approximately $87,000, and is part of CONVERSION[37] by Counterdefendant-Respondent Thomas Henesh. In a Bannock County case of *Henesh v. McKinney*

[35] Clerk's Record, p.260, line 18

[36] Ibid, p. 255-260

[37] Ibid, p. 260

(Bannock County CV 2007 - 94 - OC) Henesh sued McKinney for the use of personal equipment, including the Ice Cream Machine, which belongs to the Andersens and is on the list referenced above. The fact that this machine and other items on the list were a part of the *Henesh v. McKinney* suit, shows that Henesh was exercising control over Andersens' personal property, and is based on an agreement between his Assignor and McKinneys. Andersens intervened in the Bannock County case, and **Judge Dunn acted as Mediator.** Andersens agreed to vacate as pertaining to the personal property which were included in the original Bill of Sale in 1996. Judge Dunn, as mediator, agreed that those items (which are on the present list) could be pursued in other actions. The Counterclaim in this suit includes the Andersens' claim on the personal property and conversion on the part of the Respondents.[38] **Judge Dunn, with first-hand knowledge of the mediation agreement,** GRANTED the Motion to Dismiss[39] the Answer to Verified Amended Complaint for Eviction and Counterclaim, thus showing **prejudice against the Andersens** and thereby is believed to be **abuse of discretion.** Andersens repeated Motions to Join the personal property cases were set aside.[40]

COUNTERCLAIM INCLUDES PAYMENTS MADE AND TAXES PAID WHERE NO CLEAR TITLE PASSED

As previously discussed (p. 10), Judge Bush stated that the Title was supposed to pass to the partnership, and the Respondents admitted that THE ORIGINAL TITLE WAS NOT CORRECT (p. 14), it becomes a matter of unjust enrichment for the Respondent. Because of payments made on a

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[38] Clerk's Record, p. 260

[39] Ibid, p. 279

[40] Transcript, p. 28-30

faulty title, the Respondent was able to purchase the Note and Mortgage for a fraction of the original purchase price, and far below the appraised value. Therefore, payments made by Andersens are included in the Counterclaim.

AS ASSIGNEE, RESPONDENTS INHERIT THE LIABILITIES OF THE ASSIGNOR

In the Motion for Leave to Ammend Pleadings[41], a discussion of the Respondents' liability for Conversion and Unjust Enrichment includes the following Authorities:

1. "An actor may be liable where he has in fact exercised dominion or control, although he may be quite unaware of existence of rights with which he interferes, and a defendant's intention, good or bad faith, and his knowledge or mistake are immaterial." *Peasley Transfer & Storage Co. V. Smith,* 1132 Idaho 732, 743, 979 P.2d 605,616 (1999).
2. An actor commits conversion if the actor mistakenly believes that he or she is acting legally with respect to the other person's property, and even if the actor innocently acquires the property from a knowing converter *In re Martin,* 328 Or. 177, 184-185, 970 P.2d 638, 642 (1998).
3. *Cf. Phillips v. Utah State Credit Union,* 811 P.2d 174-179 (Utah 1991) (holding that although the limitation period for a deficiency judgment had run, the defendant could still pursue a counterclaim for conversion based on separate acts of the plaintiff.
4. "One who purchases converted property is also a converter and must answer in damages to the true owner." *Kenyon v. Abel,* 36 P.3d 1161, 1165 (Wyo.2001)

[41] Clerk's Record, p. 270-271

5. "A subsequent action for conversion is not precluded by an initial lawful taking of property." *Wolfe v. Faulkner,* 628 P.2d 700,704 (Okla. 1981)

6. "An innocent third party purchaser from a wilful trespasser/converter may be held liable for conversion because knowledge that the goods are converted is not essential to establish culpability." *Bloedel v. Timberlands Development, Inc. V. Timber industries, Inc.,* 28 Wash. App. 669, 679, P.2d 30, 36, *rev. denied,* 93 Wash. 2d 1027 (1981)

Additionally, in the Supreme Court of the State of Idaho, is the following case placing liability on the Assignee:

"The Court reasoned that the general principle that an assignee stands in the shoes of their assignor, and **acquires all of the assignor's rights and liabilities in the assignment."** *Martin v. Pioneer Title co. of Ada County* 1993 WL 381101 Idaho Dist. (Idaho Supreme Court Docket No. 96438) the Idaho Supreme Court cited *Mountain States Financial Resources Corp. v. Agrawal,*777 F.Supp. 1550 (W.E.Okla.1991)

In the present case, the Respondent claims ownership of the real property through the assignment of a Note and Mortgage.

"Said note and mortgage have now been assigned to Indian Springs LLC, the plainfiff herein by instrument dated September 27, 2005 recorded as instrument Number 188034, in the records of Power County, Idaho." *Indian Springs LLC, Assignee of D.M. & Shirley Thornhill, Husband and Wife, et al. v. Terry W. Andersen and Rosanna Andersen, husband and wife,* Idaho CV-2005-305, P. 162

The Respondents have claimed to be the Assignee of D.M. & Shirley Thornhill, husband and Wife. As in *Martin v. Pioneer Title Co. of Ada County,* the Respondents have acquired all of the assignor's rights and LIABILITIES of the Assignor. The Respondents have excersized dominion and control over personal property as documented in *Henesh v. McKinney* (p. 12 above). As in *Peasley Transfer & Storage Co. V. Smith,* whether the Respondents in this case knew of the rights of the Appellants or not, they are still in jeopardy of conversion, the same as *In re Martin,* above. Even if Appellants have not prosecuted the case against Thornhill, the Respondents are still liable in the process through the claims of giving Notice of Default, dated February of 2005, an instrument issued by the Assignor, and claimed by the Assignee (Respondents) by acquisition of the Note and Mortgage in September of 2005. in *Indian Springs LLC, Assignee of D.M. & Shirley Thornhill, Husband and Wife, et al. v. Terry W. Andersen and Rosanna Andersen, husband and wife.*

In simpler terms, How can the Assignee refuse liability, and claim contractual rights conferred from the Assignor?

RESPONDENTS REVERSED THEIR POSITION ON THE MOBILE HOME WITHOUT A MOTION TO DO SO.

As presented on page 7 of this Reply Brief, the Respondents claimed that they were entitled to immediate removal the mobile home residences (including the Appellants' home). Yet, when Judge Dunn gave legal counsel from the bench, Respondents reversed their original position, stating that the mobile home was actually part of the real property. This was done without a Motion to Amend, as required by IRCP 15(a). By his actions, Judge Dunn expidited a dramatic change of the Complaint and the Arguments for and against the Complaint without giving the Appellants

opportunity to adequately address the Claim of Ejectment.

RESPONDENTS DO NOT HAVE TITLE TO THE MOBILE HOME

In the State of Idaho, Title to a Mobile Home is given through a Certificate of Title, ISSUED BY THE STATE through the same process as an automobile. Defendants Ells and Andersens had possession of said Title[42] establishing their ownership of said title. Respondents have NEVER HAD TITLE to the Mobile Home in question, and only assumed ownership of the Mobile Home in response to the counsel given from the bench by Judge Dunn. This action in the lower court prompted an Appeal based on Abuse of Discretion.

RESPONDENTS ARE LIABLE FOR UNJUST ENRICHMENT[43]

In *Gray v. Tri-Way Construction Services, Inc.*, 2009 WL 1108812 (Supreme Court Docket 34666, 2009) The Supreme Court defined **unjust enrichment** as "the measure of recovery under a contract implied in law." *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004) "A contract implied in law ..... ' is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties.....' *Id.* The measure of recovery on an **unjust enrichment** claim "is not the actual amount of the enrichment, but the amount of enrichment which, as between two parties it would be unjust for one party to retain." *Beco constr. Co., Inc. V. Bannock Paving Co., Inc.*, 118 idaho 463 466, 797 P.2d 863, 866 (1990).

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[42] Clerk's Record, p. 162

[43] Clerk's Record, p. 261

It was the Assignor Thornhill et al, who "sold" the property without full disclosure of the environmental degradation and problems with the electrical hook-ups and septic tanks. The Assignee (Respondents) have benefited from the repairs and improvements that the Andersens performed on the property. This included improvements required by Idaho Power in 2007[44] on the Mobile Home in question. This was performed after the Assignment of Interests to the Respondents. Additional benefits include the ability to operate the RV park without being shut down for environmental issues or electrical breakdowns due to the work that Terry Andersen did on all 125 hook-ups. Prior to these improvements, RV owners had suffered inconveniences, dangers, and potentially life-threatening incidents due to improperly installed electrical connections. A full description of these improvements valued at $651,000 was in the original Counterclaim found in *Indian Springs LLC, Assignee of D.M. & Shirley Thornhill, Husband and Wife, et al. v. Terry W. Andersen and Rosanna Andersen, husband and wife* (Idaho Docket 34623), 2008, Clerk's Supplemental Record, p. 39-40, and **is included here for reference:**

COUNTERCLAIM

The Andersens have neglected to enter their counterclaim, believing that title was the more important issue. A review of the Engineer's Report (EXHIBIT W) will show that there were both environmental and safety issues that existed on the property as it was delivered to the buyer. Both of these issues should have been addressed in the Thornhill Disclosure Statement (EXHIBIT V). However, Thornhill has assigned his rights and liabilities, along with the deficiencies to the Plaintiff. Therefore, these environmental and safety issues AND liabilities are now a responsibility of the Plaintiff. The Andersens, beginning in 1998, spent time and money in remedial procedures to correct these problems. **These were expenses which should have been born by the Assignor/Assignee.**

> **Electrical Safety Hazards:** There are approximately 125 RV electrical hook-ups on the property. The condition of these hookups was described in 1997 by one electrician as "a liability suit waiting to happen." These hookups were not done by any existing code, and, as discovered by the Andersens, without any permits issued. Romex wire had been used to go underground to the hookups. First, at the power poles were fuse boxes, with anywhere from 6-10 hookups feeding through 1 or 2

[44] Ibid, p. 351-352

fuses. The hookups were constructed using an ABS pipe standing from about 6" below ground to about 18-24" above ground. A hole was cut in the upper end of the pipe to place a gang box with a 20 amp receptacle in the top, and then an ABS cap was placed on top. Since the Romex wire running to the gang box was too large for the ½" hole, the gang boxes were broken open to allow the wire to go into the gang box and provide an electrical connection to the 20 amp receptacle. This procedure made an end product which was neither protected from the elements, and was highly dangerous to youngsters and anyone who might be using the outlet. Additionally, since the early 1970's most RV's have required a 30 amp hookup. This meant that the 20 amp receptacle was the "hot spot" with 30 amp wire heading to it, and a 30 amp demand on the RV side of electric current. The Andersens have a sample of these hookups in storage for confirmation of being illegal and dangerous.

The new electrical hookups: Andersens proceeded to methodically replace all 125 hookups throughout the property. First, the fuse boxes serving the hookups were replaced with circuit breaker boxes. Then, the Romex wire was replaced with 10 gauge stranded wire running through conduit to each of the hookups. Each hookup has its own breaker switch. Each hookup was then placed on the top of a pole extending 4 feet above the ground with an approved exterior gang box to receive the wire. The receptacles are all a standard RV 30amp connection with a cover plate to protect the receptacle from the weather. Where needed, additional breaker boxes were installed and main wires run to the poles to prevent overloads on the capacity of the electrical connections. Evaluation of Value (EXHIBIT OO)

Environmental sewage problems: In the summer of 1997, the first of these problems began surfacing. There was poor drainage of effluent from RV's in the area now known as "North Grove". After an inspection by the Roto-Rooter Company, it was determined that the septic tank could take no more effluent, and would have to be replaced. When the hole was dug, it was discovered that this tank was neither sound, nor was it approved by any code. The tank was a small 300 gallon tank made of plastic, which had a crack running vertically on one side from top to bottom. In order to correct this, someone (it is believed Thornhill) had placed a railroad tie inside the tank to brace it from the weight of RV's above. Additionally, several railroad ties had been place across the top of the tank to help support the weight. The tank was not connected to the drain line meant to carry effluent away. This was only the first discrepancy discovered on the property. Several other tanks have been uncovered which have proven to be metal tanks previously used to hold manure in farming operations. These metal tanks are not up to any code previous or present. Another problem was found in the tank at the South end of the pool wherein this tank was found to be draining effluent into the stream that is formed by the overflow from the warm springs. This is a serious environmental concern which needed correction. Current code requires a drain field of adequate size placed at least 200' from any stream or body of water. The Engineer's report (EXHIBIT W) describes this total situation.

Environmental corrections completed by Andersens: The plastic sewage tank was dug up and removed, and a new 1,000 gallon concrete tank replaced it, and was connected to the existing drain line. One of the steel tanks was also replaced when the drain field became saturated. This required both a new tank and a new drain field. New restrooms were built at the North end of the pool to take care of the problem with sewerage draining into the stream. An approved 1,500 gallon tank was installed to eventually receive effluent from the pool and from other hookups. Due to the mitigating circumstances surrounding eviction, the Andersens have not been able to complete this part of remedial corrections. Evaluation of Value: (EXHIBIT OO) *Indian Springs LLC, Assignee of D.M. & Shirley Thornhill, Husband and Wife, et al. v. Terry W. Andersen and Rosanna Andersen, husband and wife* (Idaho Docket 34623), 2008, Clerk's Supplemental Record, p. 39-40

THE lower court HAS UNJUSTLY REJECTED THE COUNTERCLAIM

In his Memorandum Decision and Order, issued December 15, 2009,[45] Judge Dunn ignored the Counterclaim submitted by the Andersens on March 30, 2009.[46] The judge used the argument of a 3-year Statute of Limitations, claiming that time for the counterclaim was beyond the 3-year limit.[47] The repairs and improvements of the Counterclaim were ongoing, beginning in 1997, and **continued into 2008,** when electrical repairs were requested by Idaho Power. The Counterclaim was placed into this case on March 31, 2009, **which is well within the 3-year limit.** As stated previously, ALL of the repairs and improvements were done under the COLOR OF TITLE.[48] The Counterclaim was again referenced in the Answer to Verified Amended Complaint for Eviction and Counterclaim.[49] Judge Dunn sidestepped the issue in his Memorandum Decision and Order,[50] dated

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[45] Clerk's Record, p. 182

[46] Ibid, p. 40

[47] Ibid, p. 286

[48] Idaho Code § 6-404

[49] Clerk's Record, p. 248

[50] Ibid, p. 279

Nov. 2, 2010. In so doing he has relied on Case Law rather than Idaho Code. In *Bach v. Miller and Harris, et al,* (quoted above) case law was used only to support the Idaho Code. The Counterclaim is based on existing Idaho Code, and Idaho Code should have preference over Case Law. Idaho Code § 6-404 AND § 6-414 clearly states that the Andersens' Counterclaim is justified, and the lower should be instructed to award damages to the Andersens for their good faith efforts to correct the public safety issues inherited by a fraudulent disclosure statement issued by the Assignor and that liability has passed to the Assignee. The Respondents have a responsibility to honor their inherited liabilities.

THE lower FURTHER ABUSED ITS DISCRETION BY LIMITING THE TIME FOR REMOVAL OF PERSONAL PROPERTY.

Andersens attempted on Dec. 10, 2011 to pack up their personal belongings in preparation for removal scheduled for December 15, 2011. Respondent Henesh called in a complaint, and Andersens were asked to leave the property by a deputy who later cited them for trespass (See Appellants' Brief, p. 12). The case was later dismissed "in the interest of justice." This incident is believed to be harassment. On December 15, a telephone hearing was held, and the judge ordered that the personal property was to be removed by 4 pm December 16. The crew would not be present until Dec. 16, leaving the Andersens a limit of six (6) hours to remove their property.[51] The crew was arranged by Mahoney, and the crew's time was limited to three (3) hours to help with both the Andersens and Mahoney's property. Previously, the judge had allowed that the Andersens could take ALL of their personal property from the real property (including the other buildings), and then

[51] Clerk's Record, p. 369

limited it ot only the personal property found in the Mobile Home and the Storage Shed.[52] The judge told Appellants' Attorney to let him know if more time was needed. When Attorney Norman Reece called the judge to request more time, he only allowed an additional hour, and refused to allow the Appellants to return or obtain remaining property.[53] [54]

ATTORNEY FEES ON APPEAL

Andersens are entitled to an award of attorney fees and costs on appeal pursuant to I.C. §12-121, I.R.C.P. 54(e)(1), and I.A.R. 11.2. The Respondents' Brief contains multiple statements which are misleading and inacurate. "To be a judicial admission a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact within the party's knowledge." *Cordova v. Bonneville Cnty. Joint Sch. Dist. No.* 93, 144 Idaho 637, 641 n.3, 167 P.3d 774, 778 n.3 (2007). Andersens, although partly operating Pro-se and partly with an attorney, are entitled to Attorney Fees on the basis of *Grover v. Wadsworth* 2009 WL 540229 (Idaho) — (Idaho Supreme Court Docket No. 34810, 2009 Opinion No. 37) The Idaho Supreme Court held that:

"I. C. § 12-120(3) contains no specific language to preclude an award to *pro se*

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[52] Previous damage had been done to a small storage room attached to the mobile home — apparently during the removal of trees that were adjacent to the home, wherein the roof of the room had been broken in, exposing Andersen's personal belongings therein. Also, windows in the garage had been broken allowing birds and the elements to damage the contents of the garage.

[53] "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." Idaho State Constitution, Section I.

[54] Property: "every species of valuable right or interest that is subject to **ownership,** has an exchangeable value, or adds to one's wealth or estate." (Barron's Law Dictionary)

> litigants, However, the phrase 'attorney fee' may be interpreted to denote a monetary obligation (a fee) paid or owed from one person (a client) to another person who has provided legal representation (an attorney). Under this interpretation an attorney fee 'presupposes a relationship of attorney and client.'" *Swanson & Setzke, Chtd.* 116 Idaho at 200, 774 P.2d at 910 (quoting *Davis v. Parratt,* 608 F.2d 717, 718 (8th Cir. 1979)).

RESPONDENTS SHOULD NOT RECEIVE ATTORNEY FEES

"When attorney fees are requested, but are not discussed in the argument portion of the brief, the request will not be considered." *Bouten Constr. Co. V. H.F. Magnuson Co.,* 133 idaho 756, 768, 992 P.2d 751, 763 (1999). The Respondents' request for attorney fees is discussed on page 15 of the Respondents' Brief, and not in the Argument which begins on page 19. As in *Bouten Constr. Co. V. H.F. Magnuson Co.,* the Respondents' request **"will not be considered".**

SUMMARY OF ARGUMENT

Andersens performed many improvements on the property valued at $651,00 under Color of Title, as described in § 6-404 of the Idaho Code. These improvements were based on the belief and in good faith that at some future time, they would receive benefits for their sacrifice. During the time that these improvements were made, Andersens also contributed and acquired $87,000 of personal property which remained on the property through years of litigation. The total Counterclaim including the payments made on property with no Title is over $1.9 million. The improvements and personal property were assigned by Thornhill to the Respondents, and Idaho Code and Case Law is presented to show that the Respondents inherit the liabilities of the Assignor as well as their assumed rights. Judge Dunn has shown bias and prejudice against the Andersens by ignoring and/or sidestepping the issue of damages to the Andersens. He has further damaged the Andersens by giving

counsel from the bench to the opposing attorney, denying rights to personal property, and denying ownership of the Mobile Home in question which has been in the Andersens' possession for 13 years. With regard to statute of limitations, the property and claims were involved in bankruptcy court for several years, during which time there was a stay in place against any other actions. Such stay would toll the time from January, 2000 until the bankruptcy was closed in December of 2005. Respondents have violated the automatic stay of the bankruptcy by filing their complaint prior to the closure of the bankruptcy. During, and since the bankruptcy action, the matter has at all times been in the courts and issues tossed from court to court without resolution.

CONCLUSION

Plaintiffs-Counterclaimants-Appellants Andersens have suffered multiple damages perpetated by the Plaintiffs-Counterdefendants-Respondents (Indian Springs LLC), and the Counterdefendant-Respondent, Thomas M. Henesh. The judge in the lower abused his discretion on several rulings he made in this case bringing the necessity for the Andersens to appeal. Damages total $1.9 million plus the value of the Mobile Home to which Andersens hold Title.

THEREFORE, Appellants move the Supreme Court to remand the case back to the District Court, and instruct the lower to award Andersens Damages, including, but not limited to 1.) Improvements done under color of title as Unjust Enrichment, 2.) Conversion of personal property, and 3.) The Mobile Home to which the Appellants hold Title, and 4.) Payments made toward a flawed note where no title was passed.

Respectfully submitted this 25th day of October, 2011

Terry W. Andersen

Rosanna Andersen

CERTIFICATE OF SERVICE

We hereby certify that on this 25th day of October, 2011, we served two (2) true and correct copys of the foregoing REPLY BRIEF, by depositing the same in the United States mail, at Pocatello, postage pre-paid, in an envelope addressed to:

Lane V. Erickson, Esq.
RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
P.O. Box 1391
Pocatello, ID 83204-1391

Terry Andersen

Rosanna Andersen